PP

v.

CHANG HAN YUAN

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 41-43-99]
1 SEPTEMBER 1999

CRIMINAL PROCEDURE: *Jurisdiction of court - Sessions Court - Whether having exclusive jurisdiction to hear cases under Women and Girls Protection Act, 1973 - Section 31(1) of Act - Scope and effect - Whether exclusive in nature - Whether only permissive - Whether only giving Sessions Court additional jurisdiction - Whether having the effect of excluding jurisdiction of magistrates' courts*

STATUTORY INTERPRETATION: *Construction of statutes - Section 31(1) Women and Girls Protection Act 1973 - Scope and effect - Whether conferring exclusive jurisdiction to Sessions Court to hear cases under the Act*

WORDS & PHRASES: *"Shall" - Women and Girls Protection Act 1973, s. 31(1)*

Before the Magistrate's Court, the respondent was convicted of an offence under s. 16(1)(k) of the Women and Girls Protection Act 1973 ('the Act') and was fined RM3,000 in default three months' imprisonment. Being dissatified the Public Prosecutor appealed against the sentence passed. At the hearing of the appeal, the learned High Court judge, exercising his revisionary powers, invited the parties to submit on the construction of s. 31(1) of the Act, purportedly to resolve the question of whether s. 31(1) of the Act had conferred exclusive jurisdiction on the Sessions Court to hear and dispose of cases under the Act. The prosecution in consequence submitted that s. 31(1) of the Act was not exclusive and did not oust the jurisdiction of the magistrate's court, whilst the defence argued that the section was exclusive in nature and that only a Sessions Court was empowered to hear cases under the Act.

Held:

[1] In deciding whether the Sessions Court has exclusive jurisdiction to try offences under the Act, it is necessary to consider the operative words in s. 31(1) of the Act, particularly the phrase "… a Sessions Court in West Malaysia…shall have jurisdiction to try an offence …" therein ('the phrase'). That apart, the rule of construction that exclusion of court's jurisdiction is not to be readily inferred and that such exclusion must be explicitly expressed or clearly implied, the rule which applies equally to both the civil and criminal courts, ought also to be considered.

[2] There is an absence of clear and unambiguous words in s. 31(1) of the Act such as to enable the court to construe that the section has conferred exclusive jurisdiction on Sessions Court to try offences under the Act. Indeed, the use of the word "may" in the Explanatory Statement in the Bill to the Act shows that the jurisdiction conferred on the Sessions Court is intended to be permissive. Hence, the jurisdiction to try offences under the Act is not exclusive to the Sessions Court and the Magistrate's Court is not therefore deprived of the jurisdiction.

[3] The use of the word "shall" in the phrase only means that when an offence under the Act is filed in the Sessions Court it is imperative for the Sessions Court to exercise the jurisdiction. The word "shall" therein thus refers to its imperative nature in relation to the exercise of the jurisdiciton and not to its exclusivity in confining the jurisdiction to a Sessions Court. The opening words of s. 31(1) of the Act show that this is an additional jurisdiction conferred to a Sessions Court.

[4] As reflected in the object of the Act, the rationale for conferring the additional jurisdiction on the Sessions Court is to enhance the penalties for offences under it. However, with the present increase in the jurisdiction of magistrates' courts, s. 31(1) may be rendered otiose.

[5] Although a custodial sentence is not appropriate the fine imposed warranted interference. In the circumstances, the fine is varied to one of RM5,000.

[Appeal dismissed.]

Case(s) referred to:
Bank Negara Malaysia v. Gerald Glesphy & Ors [1992] 1 CLJ 15 ***(foll)***
Bhimsen v. State of UP AIR [1955] SC 435 ***(refd)***
Ex parte McGavin; Re Berne [1945] 46 SR (NSW) 58 ***(refd)***
Kilhota Hollohan (Shri) v. M/s Zachilhu AIR [1993] SC 412 ***(refd)***
Ng Kook Kin v. PP [1995] 3 CLJ 905 ***(not foll)***
Pyx Granite Co Ltd v. Ministry of Housing and Local Government [1959] 3 All ER 1 ***(cit)***
Secretary of State v. Mask & Co AIR [1940] PC 105 ***(cit)***
State of MP v. Rameshwar Rathod AIR [1990] SC 1849 ***(cit)***
State of West Bengal v. Anwar Ali AIR [1952] SC 75 ***(cit)***
United Provinces v. Atiqa Begum [1940] FCR 110 ***(refd)***

Legislation referred to:
Contracts (Amendment) Act 1976, s. 7
Lembaga Kemajuan Ikan Malaysia Act 1971, s. 20
Women and Girls Protection Act 1973, ss. 16(1)(k), 31(1)

Criminal Appeal Act 1912 [NSW], s. 5B

For the PP - Fatnin Yusof DPP
For the accused - ML Ooi; M/s Ooi & Assoc

Reported by WA Sharif

JUDGMENT

Augustine Paul J:

The accused was charged in the Magistrate's Court at Kuala Lumpur for an offence under s. 16(1)(k) of the Women and Girls Protection Act 1973 ("the Act"). The offence is punishable with imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand dollars or to both such imprisonment and fine. The accused pleaded guilty to the charge and the learned magistrate imposed a fine of RM3,000 in default three months' imprisonment. The Public Prosecutor appealed against the sentence passed.

In the course of the submission of both parties at the hearing of the appeal I invited them, in the exercise of my powers of revision, to submit on the construction of s. 31(1) of the Act which reads as follows:

> Notwithstanding the provisions of any written law to the contrary, a Sessions Court in West Malaysia and a Court of a Magistrate of the First Class in Sabah or Sarawak shall have jurisdiction to try an offence under this Act and to award the full punishment for any such offence.

I was prompted to enter into this inquiry by a report in The Star newspaper of 31 July 1999 where it was reported that the Penang High Court, in ruling that "… it was clear that s. 31(1) of the Act provided that in the Peninsula, only a Sessions Court was vested with the jurisdiction to hear and dispose of cases under the Act", set aside the sentence imposed by the Magistrate's Court and remitted the case to the Sessions Court for disposal. Learned counsel for the defence contended that s. 31(1) of the Act is exclusive in nature and that only a Sessions Court has jurisdiction to try offences under the Act. The learned Deputy Public Prosecutor, on the other hand, said that s. 31(1) of the Act is not exclusive but merely confers an additional power on the Sessions Court to try offences under the Act and that the jurisdiction of the Magistrate's Court is therefore not ousted.

In construing s. 31(1) of the Act I shall first refer to the case of *Ng Kook Kin v. PP* [1995] 3 CLJ 905; [1995] 2 MLJ 35 where s. 20 of the Lembaga Kemajuan Ikan Malaysia Act 1971 ("the section") arose for consideration. The section, similar to s. 31(1) of the Act, reads as follows:

> Notwithstanding anything to the contrary in any other written law, a Sessions Court in West Malaysia and the Court of a Magistrate of the First Class in East Malaysia, shall have jurisdiction to try any offence under this Act or under any rule made thereunder, and to award full punishment for any such offence.

It was held in that case that upon a plain reading of the section only the Sessions Court is vested with jurisdiction to hear and dispose of cases under the Lembaga Kemajuan Ikan Malaysia Act 1971 as the word "shall" appearing in the section reflects a measure of mandatoriness and the section empowers only the Sessions Court to award the full punishment of offences under that Act. This would appear to be the stand taken by the Penang High Court in construing s. 31(1) of the Act.

In my opinion a resolution of the problem at hand requires a consideration of the operative words of s. 31(1) of the Act, that is to say, "… a Sessions Court in West Malaysia … shall have jurisdiction to try an offence …" ("the phrase"). Does this phrase confer an exclusive jurisdiction on the Sessions Court to try offences under the Act?

In ratiocinating this issue I can do no better than refer to the judgment of the (then) Supreme Court in *Bank Negara Malaysia v. Gerald Glesphy & Ors* [1992] 1 CLJ 15; [1992] 1 MLJ 15, where the construction of s. 7 of the Contracts (Amendment) Act 1976 containing words similar to those in the phrase arose for deliberation. That section reads as follows:

> Notwithstanding anything contained in any written law to the contrary, the Sessions Court and, in the case of Sabah and Sarawak, the Court of a Magistrate of the First Class shall have jurisdiction in all civil proceedings which arise from or relate to a scholarship agreement.

In ruling that the language employed in that section does not say that the jurisdiction is exclusive to the Sessions Court Harun Hashim SCJ, in writing for the Court, said at p. 153:

> But is the jurisdiction exclusive to the Sessions Court? The plain wording of s. 7 does not say so. It merely says 'the Sessions Court … shall have jurisdiction …'. It would be different if the word 'only' is added before the words 'the Sessions Court' or by some other expressions like 'to the exclusion of any other Court'. The words, 'Notwithstanding anything contained in any written law to the contrary', in this context, can only refer to s. 65 of the Subordinate Courts Act 1948 which limit the civil jurisdiction of the Sessions Court to claim not exceeding $25,000 before 1976 and $100,000 thereafter. Section 7 is therefore only permissive and not imperative in enhancing the jurisdiction of the Sessions Court.

The Supreme Court has therefore ruled that the jurisdiction is not exclusive to the Sessions Courts as such an intention has not been clearly expressed. This is in line with the rule of construction that the exclusion of jurisdiction of courts is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied (see *Secretary of State v. Mask & Co* AIR [1940] PC 105). This rule of construction is not limited to civil courts alone, but applies to all courts of general application including criminal courts (see *Bhimsen v. State of UP* AIR [1955] SC 435; *State of West Bengal v. Anwar Ali* AIR [1952] SC 75; *State of MP v. Rameshwar Rathod* AIR [1990] SC 1849). It is a principle by no means to be whittled down and has been referred to as a "fundamental rule" (see *Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1959] 3 All ER 1). However, the rule against exclusion of jurisdiction of courts like other rules of construction is attracted only where two or more reasonably possible constructions are open on the language of the statute and not where the legislative intent is plain and manifest to oust the jurisdiction (see *Kilhota Hollohan (Shri) v. M/s Zachilhu* AIR [1993] SC 412). In this respect I refer to *United Provinces v. Atiqa Begum* [1940] FCR 110 where Sir Shah Sulaiman J said:

> The intention of the legislature has to be gathered from the language employed in the Act. For statutes which confer or take away legal rights, whether public or private, or alter the jurisdiction of courts of law, express and unambiguous words are necessary.

It follows that if s. 31(1) of the Act is to be construed so as to confer exclusive jurisdiction on Sessions Courts to try offences under the Act then clear words to that effect are necessary. There is an absence of such clear and unambiguous words in s. 31(1) of the Act just as in s. 7 of the Contracts (Amendment) Act 1970 referred to earlier. Thus there is no legislative intent to oust the jurisdiction of the Magistrate's Court to try offences under the Act. As a matter of fact the true intention of the legislature in enacting s. 31(1) of the Act can be gathered from its Explanatory Statement in the Bill to the Act which reads as follows:

> Clause 31 provides that offences under this Act may be tried by a Sessions Court in West Malaysia or the Court of a Magistrate of the First Class in Sabah and Sarawak and that prosecution for an offence is to be instituted only with the sanction of the Public Prosecutor. (emphasis added)

The use of the word "may" in the Explanatory Statement shows that the jurisdiction conferred on the Sessions Court is intended to be permissive. It is permissive in the sense that the jurisdiction to try offences under the Act is not exclusive to the Sessions Court with the result that the Magistrate's Court is not deprived of the jurisdiction.

I consider it necessary to analyse the effect of the word "shall" in the phrase that compelled the Courts in the cases that I have referred to in the early part of the judgment to take the particular stand. In my opinion the use of the word "shall" in the phrase only means that when an offence under the Act is filed in the Sessions Court it is imperative for the Sessions Court to exercise the jurisdiction. The use of the word "may" instead of "shall" in the phrase may have incongruous results if construed as being permissive. In that event a Sessions Court may decline to exercise the jurisdiction when required to do so. It is for this reason that it has been recognised that where there is an authority to exercise jurisdiction that power must be exercised even though expressed in discretionary terms. This is illustrated by the case of *Ex parte McGavin; Re Berne* [1945] 46 SR (NSW) 58. Section 5B of the Criminal Appeal Act 1912 (NSW) provided that:

> A court of quarter sessions may submit any question of law arising on any appeal coming before it to the Court of Criminal Appeal for determination …

On the question whether the use of the word "may" gave a discretion to submit a question of law, Jordan CJ said at pp. 60-61:

> The word 'may' in *prima facie* facultative only; but it was pointed out in *Macdougall v. Peterson* [1851] 11 CB 755 at 773, that 'when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised, to exercise the authority when the case arises, and its exercise is duly applied for by a person interested, and having the right to made the application' … In my opinion, it is the duty of a Chairman of Quarter Sessions to submit to the Court of Criminal Appeal any question of law which either party to the appeal may raise and ask to be so submitted, unless, in his opinion, the question is so obviously frivolous and baseless that its submission would be an abuse of process'.

The word "shall" was thus inserted in the phrase to render the exercise of the jurisdiction imperative. Even if the word "may" had been used a similar construction would have to be given. The use of the word "shall" in the phrase thus refers to its imperative nature in relation to the exercise of the jurisdiction and not to its exclusivity in confining the jurisdiction to a Sessions Court. The opening words of s. 31(1) of the Act show that this is an additional jurisdiction conferred on a Sessions Court. If the imperative power was to be exclusive then clear words to that effect ought to have been employed which was not done in this case. It is therefore clear that s. 31(1) of the Act is mandatory only in the sense that the Sessions Court must exercise the jurisdiction when required to do so.

The rationale for conferring this additional jurisdiction on the Sessions Court can be gathered from another object of the Act as stated in the Explanatory Statement in the Bill of the Act. It reads as follows:

> Part IV describes the various offences under the Act. These in general follow the offences set out in the existing legislations but the maximum penalties for such offences have been greatly enhanced as provided in Clauses 16, 18, 19, 20 and 21 for it is felt that the penalties provided in the existing legislations are manifestly inadequate.

It will therefore be observed that one of the objects of the Act is to enhance the penalties for offences under it. The reason for enhancing the jurisdiction of Sessions Courts to try offences under the Act and to award the full punishment can be discerned easily. In 1973 when the Act was passed a Magistrate's Court had jurisdiction to try offences for which the maximum term of imprisonment did not exceed five years or which were punishable with fine only. However, a Magistrate's Court could then impose only, inter alia, a maximum of two years' imprisonment and a fine of five thousand dollars. The jurisdiction of a Sessions Court was wider. It could try offences for which the maximum term of imprisonment did not exceed ten years or which were punishable with fine only and could then impose, *inter alia*, a maximum of five years' imprisonment and a fine of ten thousand dollars. As the punishable

sections of the Act prescribe a maximum term of imprisonment of five years offences under the Act would have fallen within the jurisdiction of the Magistrate's Court in the absence of a provision like s. 31(1) of the Act with the result that the penalty that could be imposed was only a maximum term of imprisonment of two years and a fine of five thousand dollars. This would have been inconsistent with the objective of the Act. It was to achieve this objective that Parliament had enacted s. 31(1) of the Act to confer the additional jurisdiction on the Sessions Courts with power to impose the full punishment in appropriate cases. The permissive nature of s. 31(1) of the Act as described earlier does not take away the jurisdiction of Magistrates' Courts to try offences under the Act though the punishment that may be imposed is restricted as I have stated earlier.

Thus, in accordance with the guidelines laid down by the (then) Supreme Court in *Bank Negara Malaysia v. Gerald Glesphy & Ors* [1992] 1 MLJ 15 I held that s. 31(1) of the Act is permissive and not exclusive in nature in the absence of any clear words to the contrary. I interpolate to add that the present increase in the jurisdiction of Magistrates' Courts renders s. 31(1) of the Act otiose.

I then considered the merits of the appeal based on the submission of both parties. On a consideration of the grounds of judgment of the learned magistrate I agreed that a custodial sentence was not appropriate on the facts of the case though the fine imposed warranted interference. Accordingly, I varied the fine to one of RM5,000.